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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

1. The school district's denial of access to petitioners is violative of the First and Fourteenth Amendments' ban on viewpoint-based discrimination.

Viewpoint-based discrimination involves differential treatment by the State of expression or attempted expression by non-government speakers based on the speakers' differing positions on a given topic. The school district would grant access to its facilities to any individual or group—including petitioners—for the purpose of addressing, or advocating a position on, the topic of family life, as long as that discussion or advocacy is not based on a religious approach. Petitioners' religious viewpoint on the topic of family life is thus the school district's basis for suppressing petitioners' speech. For that reason alone—regardless of the nature of the forum created by the State—the school district's exclusion of petitioners' speech offends the Constitution.

2. The court below erred in its analysis of the forum issue, and that error provides a second independent ground for reversal.

The Court of Appeals determined that the forum created by the school district is a limited public forum, and that speech for religious purposes is outside the scope of that limitation. That court's analysis as to the limited nature of the forum, and as to the determination of the limitation, is based entirely on the school district's own statement as to the scope of the forum.

But whether a forum created by the State is a public forum, a limited public forum, or a non-public forum is a matter of federal constitutional law, not simply of the characterization given to the forum by the government entity involved. As this Court's cases involving limited public fora illustrate, the defining characteristic of a "limited public forum" is that expression for its own

sake is not the government objective for which the forum was created; rather, in such a forum, expression by non-government speakers is a means of furthering a particular government objective other than pure expression. Expression that is outside the scope determined by the government objective that underlies the creation of the forum is therefore expression that the State may legitimately classify as outside the scope of the limited public forum.

Here, the school district opened its facilities during non-instructional time for use by non-government speakers to accomplish no other government purpose than the provision of a place for expression. That being so, as in *Widmar v. Vincent*, 454 U.S. 263 (1981), the State's express exclusion of expression based on a religious approach cannot define the forum for constitutional purposes. Here, as in *Widmar*, there is no nexus between the reasons that led the State to create the forum and the purported restriction on speech. The State's interest in creating a forum for undirected expression by non-government speakers simply provides no principled basis for excluding specific subject matters from that forum.

ARGUMENT

1. The facts essential to frame the constitutional issue presented here are as follows:

Pursuant to state law and its own local rules, the school district makes its facilities available during certain non-instructional hours to individuals or groups not associated with the school district for a wide range of non-school-related purposes, including:

> For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainments and uses shall be non-exclusive and open to the general public. [N.Y. Educ. Law § 414.1(c) (McKinney 1988 & Supp. 1992); Pet. App. 53a.]

The state statute as judicially interpreted and the school district rules go on to provide that "[t]he school premises shall not be used by any group for religious purposes." Pet. App. 56a.

A local church and its pastor, petitioners, applied for permission to use the school district's facilities to show a film series to the public on the subject of family life. The school district requested "'a more detailed description of your proposed use (including a brochure describing the film)'" because the school district "'suspect[ed] that [the film] would certainly have religious connotations.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 384 (2d Cir. 1992). The pastor submitted a brochure, which the court below described as follows:

> In the film, Dr. James Dobson, said to be an expert on family life, "reminds parents of society's slide toward humanism—the undermining influences of radio, television, films and the press—which can only be counterbalanced by a loving home where Christian values are instilled from an early age." [959 F.2d at 384.]

Based on this description, the school district rejected petitioners' application, stating: "'This film does appear

to be church related and therefore your request must be refused.'" *Id.*

2. In our view, the school district's denial of access to petitioners is plainly violative of the First and Fourteenth Amendments' ban on viewpoint-based discrimination.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster v. New York Crime Victims Board*, 112 S.Ct. 501, 508 (1991) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)). The constitutional limitation on content-based regulation extends both "to restrictions on particular viewpoints," and "to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980). In part 3, *infra*, we analyze the circumstances in which the State may have some power to exclude "discussion of an entire topic" from a particular forum.

Be that as it may, the dispositive point here is that, regardless of the nature of the forum, the State may *not* restrict speech based on the viewpoint of the speaker. "The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). *See also International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Precisely defined, viewpoint-based discrimination involves differential treatment by the State of expression or attempted expression by nongovernment speakers based on the speakers' differing positions on a given topic. This Court's cases are uniform in holding that such discrimination is *not* a proper basis for suppression of speech by the State. *See, e.g., Cornelius v. NAACP Legal De-*

fense & Educ. Fund, supra, 473 U.S. at 806 ("the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("[e]specially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended" (footnote omitted)). *See also Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

The school district's exclusion of petitioners from the forum here is a classic instance of viewpoint-based discrimination. The school district would grant access to its facilities to any individual or group—including petitioners—for the purpose of addressing, or advocating a position on, the topic of family life, as long as that discussion or advocacy is not based on a religious approach. Thus, the school district would provide a forum for meetings at which theories of family life could be espoused based on secular perspectives such as psychology, parapsychology, sociology, or the physical sciences.

Yet, the school district barred petitioners from using the same facilities to espouse their views on the *same topic*, family life, because petitioners' views on that topic rest on a religious base—*viz.*, the importance of "'a loving home where Christian values are instilled from an early age.'" 959 F.2d at 384. Petitioners' viewpoint on the topic of family life is the school district's basis for suppressing petitioners' speech, and for that reason alone the school district's exclusion of petitioners' speech offends the Constitution.

3. As this Court stated in *Cornelius v. NAACP Legal Defense & Educ. Fund, supra:*

> [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. [473 U.S. at 800.]

Application of this analysis in any given case depends on a determination whether the forum in question is a public forum, a limited public forum, or a nonpublic forum. *Id.*; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. at 45-46. For the reasons stated in part 2, *supra*, it is our view that the result in this case is the same whether the forum from which petitioners were excluded is characterized as a public forum, a limited public forum, or a nonpublic forum. We are equally certain that the court below erred on the forum issue and that its error provides a second independent ground for reversal. We turn to demonstrating as much now.

The Court of Appeals determined that the forum created by the school district is a limited public forum, and that speech "for religious purposes" is outside the scope of that limitation. That court's analysis as to the limited nature of the forum, and as to the definition of the limitation, is based entirely on the school district's own statement of the scope of the forum. Because the school district rules—as well as the definitive judicial interpretation of the state statute—provide that school district premises "shall not be used by any group for religious purposes," the court below concluded that the forum created by a school district is a limited public forum excluding expression "'for religious purposes.'" 959 F.2d at 387. So far as the Court of Appeals was concerned, the school district's statement of the scope of the forum the school district intended to create *conclusively determines* the scope of that forum for the purposes of determining the constitutional rights of those

who wish to use the forum as a medium of expression. That understanding of the governing law is in error.

Whether a forum created by the State is a public forum, a limited public forum, or a nonpublic forum for purposes of the federal Constitution is a matter of federal constitutional law, not a matter simply of the characterization given to the forum by the government entity involved. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Cornelius v. NAACP Legal Defense & Educ. Fund, supra*, 473 U.S. at 805 ("The decision of the Government to limit access to the CFC is not dispositive in itself; instead it is relevant for what it suggests about the Government's intent in creating the forum").

At its root, the constitutional concept of a limited public forum derives from the understanding that aside from those parts of the public property that have traditionally been recognized as public fora—streets and parks being the classic examples (*Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.))—the remainder of the property held by the State need not be opened as places for expression by nongovernment speakers. The State may use those of its facilities that are in this latter category in the manner the State determines is best suited to accomplish the State's legitimate objectives. "'The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra*, 460 U.S. at 46 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

The State, of course, may dedicate some of its property to the creation of public fora in addition to those that exist by virtue of our constitutional tradition. For example, the State may devote a public auditorium to use as a place for general public expression. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). A public forum so created by the State is subject to all of

the constitutional constraints on government regulation of speech that apply to a traditional public forum, so long as the State continues that use of the property. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra*, 460 U.S. at 46.

Alternatively, as the Court has recognized, the State may open government property to nongovernment speakers as a means of furthering some governmental objective other than the objective of facilitating the *general* exchange of ideas. Thus, a government entity may determine that a public meeting should be held to discuss—and to thereby secure guidance from the citizenry on—a specific question of policy, without opening that meeting to discussion of other policy questions. *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976). A public university or high school may determine that it would enrich and supplement the educational experience of its students to permit student groups to use its facilities for meetings or gatherings on subjects of the students' choosing, without granting the same permission to nonstudents. *See Widmar v. Vincent, supra; Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990). A community may decide to enhance the cultural lives of its children by devoting a public auditorium to use by those who put on plays for children, without opening the auditorium to other types of uses by nongovernment speakers. *Cf. Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. at 572-73 (Rehnquist, J., dissenting).

As each of these examples illustrates, the defining characteristic of a "limited public forum" is that expression by nongovernment speakers is a means of furthering a particular government objective. That objective, in turn, determines the scope of the limited public forum that is created. Simply put, the defining characteristic of a limited public forum is that expression for its own sake is not the government objective for which the forum was

created; rather, in such a forum, expression by nongovernment speakers is a means of furthering a particular government objective other than pure expression. Thus, expression that is outside the scope determined by the government objective that underlies the creation of the forum is expression that the State may legitimately classify as outside the scope of the limited public forum.[1]

The concept of a limited public forum should not be allowed to float free from its rationale. If the State were

[1] The State does not necessarily create a public forum, even a limited public forum, merely by granting certain nonpublic speakers access to public facilities. "Not every instrumentality used for communication . . is a traditional public forum or a public forum by designation." *Cornelius v. NAACP Legal Defense & Educ. Fund, supra*, 473 U.S. at 803. Thus, although some communication by nongovernment speakers was involved, the *Cornelius* Court ruled that the Combined Federal Campaign, a consolidated medium for charitable solicitation in the federal workplace, is a *nonpublic* forum:

> The historical background indicates that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by *lessening* the amount of expressive activity occurring on federal property. Indeed, the OPM stringently limited expression to the 30-word statement included in the Campaign literature. The decision of the Government to limit access to the CFC is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum. The Government did not create the CFC for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes. [473 U.S. at 805 (emphasis in original).]

See also Perry Education Ass'n v. Perry Local Educators' Ass'n, supra (allowing the union that is the exclusive bargaining representative of a school district's employees to use the school district's internal mail system did not make that system a public forum); *Greer v. Spock, supra* (allowing occasional civilian speakers on a military base did not make the base a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (selling commercial advertising space on vehicles in a public transit system did not make such space a public forum).

able to define a limited public forum merely by the *ipse dixit* that certain subjects or certain speakers are excluded from the forum, the framework established for analysis of the constitutional rights at stake would be infinitely manipulable and the integrity of the underlying rights would be at risk.

The instant case illustrates the point. Here the school district opened its facilities during noninstructional time for use by nongovernment speakers to accomplish no other government purpose than the provision of a place for expression. So far as appears, the school district had no affirmative interest in facilitating the discussion of any particular topic or in stimulating expressive activity for the benefit of, or by, any particular group. That being so, the purposes of this forum are no different than the purposes of a traditional public forum: "assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO, supra*, 307 U.S. at 515.

When the forum is of this nature, the State's claim to exclude certain subjects from the forum should have no more validity than the State's claim to exclude the same subjects from a traditional public forum. This Court's decision in *Widmar v. Vincent, supra*, establishes that very point.

In *Widmar*, a public university adopted a policy of providing university facilities for meetings of student groups. As here, the university had no affirmative interest in the particular subject matter of these meetings. And, as here, the university purported to exclude from this forum meetings " 'for purposes of religious worship or religious teaching.' " 454 U.S. at 265. The Court began its analysis by recognizing that the university had created a public forum, albeit one limited to student groups:

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the

> University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. [*Id.* at 267-68 (footnote omitted).]

The Court then stated the standard the university was required to meet in order to justify exclusion of religious speech from the limited public forum at issue:

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. [*Id.* at 269-70.]

Finally, the *Widmar* Court stated its holding as follows:

> Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards. [*Id.* at 277; *see also Board of Educ. of Westside Community Schs. v. Mergens*, *supra*, 496 U.S. 226.]

In *Widmar*, the nature of the government interest being pursued was such that it was proper to limit the public forum to student organizations and to close the forum to the general public. In all other respects, the public forum created there is analytically the same as the public forum created here. As in *Widmar*, then, the State's express exclusion of religious teachings from the forum here cannot define the forum for constitutional purposes.

In both instances, there is no nexus between the purported restriction on speech and the reasons that led the State to create the forum. The State's interest in creating a forum for undirected expression by nongovernment speakers simply provides no principled basis for excluding specific subject matters from that forum.

CONCLUSION

For the above stated reasons, the Court should reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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